Supreme Court, U.S.
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No. 97-1010

In The

Supreme Court of the United States

October Term, 1997

BELL BROTHERS, ET AL.,

Petitioners,

vs.

BANK ONE INDIANA, N.A., FORMERLY
BANK ONE LAFAYETTE, N.A.;
FORMERLY PURDUE NATIONAL BANK,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circiut**

RESPONDENT'S BRIEF IN OPPOSITION

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16 pp

QUESTIONS PRESENTED

1. Whether Petitioners' argument that the Federal District Court has jurisdiction under Federal RICO statutes to hear the Petitioners' claims relative to Purdue National Bank's alleged violation of Federal and State RICO statutes presents any issue for review where Respondent has never argued against jurisdiction, the judgment of the district court was on the merits, and the Seventh Circuit Court of Appeals specifically stated that jurisdiction of the district court existed.

2. Whether Petitioners' argument that Purdue National Bank, as created under the National Bank Act, is not entitled to certain immunities from their claims relative to the Bank's trust department acting as an escrow agent or purported escrow agent for Petitioners' investment funds presents any issue for review where Respondent Bank has never claimed any immunities as a defense and the district court entered judgment for Respondent Bank based on evidence prejudicial to Petitioners' case rather than on immunity of the Bank to Petitioners' claims.

LIST OF PARTIES

The proper respondent to the Petition for Writ of Certiorari should be:

BANK ONE, INDIANA, N.A. (Formerly Bank One, Lafayette, N.A.; formerly Purdue National Bank)

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STATEMENT OF JURISDICTION

The Seventh Circuit Court of Appeals entered its judgment on June 20, 1997 and denied rehearing on July 18, 1997. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This case is about a group of unsophisticated investors who lost money to a slick promoter and ever since have been looking for a deep pocket to make good their losses. This case is not about jurisdiction or immunity, the issues described by Petitioners, but about lack of evidence showing a relationship existed between these unsophisticated investors and the Respondent Bank that would make the Bank liable for the investors' losses. Lack of evidence on the existence of such a relationship was fatal to Petitioners' cause in the lower courts – not lack of jurisdiction or immunity of the Bank to Petitioners' claims. Petitioners have presented no compelling reason for review.

In the early 1980's, a promoter named William Tully, together with a few associates, formed a series of gas and oil limited partnerships, known as the "Mid-America Energy Oil and Gas" programs or "Mid-America Partnerships." These programs were sold to unwary investors, including Petitioners, who, when their expectations were disappointed, filed suit against numerous defendants, including Purdue National Bank (now known as Bank One, Indiana N.A., formerly Bank One, Lafayette, N.A.). These plaintiffs, now Petitioners herein, sought to hold

the defendants liable for their investment losses. (William Tully was a defendant, although not a party to the appeal to the Seventh Circuit or to this proceeding.)

Petitioners' suit in the district court alleged acts in violation of the federal Securities Act of 1933 [15 U.S.C. § 77a, *et seq.*], violation of SEC Rule 10(b), and federal RICO statutes (18 U.S.C. § 1961 *et seq.*) predicated on mail fraud and wire fraud. Jurisdiction of Petitioners' suit in the district court was based on 28 U.S.C. § 1331, which gives federal courts original jurisdiction over civil claims "arising under the Constitution, law or treaties of the United States." In addition, jurisdiction over the federal RICO claims was conferred under 18 U.S.C. § 1964(c), which states in pertinent part: "Any person injured in his business or property by reason of a violation of section 1962 of this chapter [18 U.S.C. § 1962] may sue therefor in any appropriate United States district court. . . . " Petitioners also alleged violations of state law, over which violations the district court had jurisdiction under the doctrine of pendent jurisdiction. This doctrine allows a federal court to decide state claims over which it would otherwise lack jurisdiction when both state and federal claims arise out of "a common nucleus of operative fact." *United Mine Workers v. Gibbs*, 383 U.S. 751, 86 S.Ct. 1130 (1966). (This concept was codified under the name of "supplemental jurisdiction" in 28 U.S.C. § 1367; however, 28 U.S.C. § 1367 applies to actions commenced after its date of enactment, which was December 1, 1990. Therefore this statute does not appear to govern the present case, which commenced in 1984.)

Petitioners eventually settled with, got judgments against, or dismissed all defendants except Respondent

Bank. Although Petitioners advanced both federal law and state law as legal bases for liability on the part of Respondent Bank, the parties agreed that the factual basis of all Petitioners' legal theories was the existence of an escrow relationship among the Bank as third-party escrow agent, Petitioners, and the various limited partnerships formed by Tully and his associates. *See* District Court Order, Petition, Appendix B, p. 11a. If no escrow relationship was established with Petitioners' monies, all claims of Petitioners against Respondent Bank would fail. *Id.*

Respondent Bank denied any escrow relationship with Petitioners. Petitioners' evidence that an escrow relationship existed included statements in the offering materials prepared by Tully and his attorneys that the Bank would act as an escrow agent for Petitioners' monies, evidence that Tully opened commercial checking accounts at the Bank, two of which carried the term "escrow" in the account name given by Tully, and some witnesses who were willing to testify that they saw written escrow agreements (although the Bank denied entering into such an agreement and none was ever produced) or that agents of the Bank told them there were escrow accounts (although this, too, was denied by the Bank). Issues in the case against the Bank were to be bifurcated for trial, the first phase of which was to be trial on the issue of the existence of an escrow relationship. The issue to be presented in the liability phase was narrowly drawn, as stated in the Pretrial Order:

> Whether the bank accounts at Purdue National Bank in the name of the Mid-America Partnerships or related programs, including the Tully

> program, were demand checking accounts so that Purdue National Bank was only obligated to disburse or transfer funds from such accounts at the direction of the persons with signature authority over the accounts; or, were the bank accounts being held by Purdue National Bank as an escrow agent or as a "purported" escrow agent so that Purdue National Bank assumed additional fiduciary duties?

Id. at p. 10a.

After formulation of the precise issue for trial, and prior to commencement of the trial, Respondent Bank filed a motion for summary judgment and a supporting memorandum in which Respondent pointed out that Petitioners admitted giving their monies directly to Tully or his associates and the documents themselves showed that none of Petitioners' funds had been deposited in accounts over which the Bank had authority to withhold funds from Tully. Petitioners answered and submitted three volumes of documentary evidence in opposition to the motion. *See id.* at p. 6a. Upon consideration, the District Court found that "regardless of whether plaintiffs [Petitioners herein] intended to create an escrow relationship with P[urdue] N[ational] B[ank], and regardless of whether a genuine issue of material fact exists concerning an alleged escrow agreement" no escrow relationship with Purdue National Bank was established as a matter of law because the Petitioners failed to satisfy the delivery element necessary under Indiana law to establish an escrow relationship. *Id.* at p. 11a. That is, Petitioners failed to show that their funds reached any account but the demand checking accounts established by Tully. Such

accounts as a matter of law created no escrow relationship with the Respondent Bank so as to make the Bank liable to Petitioners for withdrawals by Tully. Consequently, the district court granted summary judgment in favor of the Bank and against Petitioners.

The result of summary judgment in favor of the Bank was that all of Petitioners' claims failed. After entry of final judgment against Petitioners, Petitioners appealed to the Court of Appeals for the Seventh Circuit. Judge Easterbrook, writing for the Seventh Circuit panel, succinctly summarized the evidence and Petitioners' position, when he says in pertinent part:

> The Bank was not a promoter or underwriter of the partnerships; it did not sign the offering circulars or have a financial interest in the ventures. . . . According to the circulars, the Bank was to serve as escrow agent. Nonetheless, Tully placed the money into demand accounts over which he had (and used) full dominion. Plaintiffs [Petitioners herein] believe that the Bank's failure to control access to the funds defrauded them. . . . [However, Petitioners] did not remit funds to the Trust Department of the Bank as escrow agent; they gave negotiable instruments to Tully, who deposited them into commercial accounts at the Bank. . . . Plaintiffs ask us to treat this as equivalent to delivery from the investors to the Bank; after all, they say, the funds came into the Bank's hands. So they did – but not into the Bank's hands *as the investors' agent*. [Emphasis in original.]

Opinion of the Seventh Circuit, Petition, Appendix A, p. 2a-3a.

The Seventh Circuit affirmed the decision of the district court, saying: "[W]e agree with the district court that the investors could not prevail at trial, so the judgment is sound." *Id.* at p. 2a.

REASONS FOR DENYING THE PETITION

The decision below, affirming that of the district court, is correct. There is no conflict or any other compelling reason for further review by this Court.

A. Petitioners' argument that the Federal District Court has jurisdiction under Federal RICO statutes to hear the Petitioners' Claims as to whether Purdue National Bank violated Federal and State RICO statutes presents no issue for review.

Petitioners state there is an issue on whether the federal district court had jurisdiction to hear their federal and state RICO claims against the Bank. Petitioners then argue that the federal court did have jurisdiction. *See* Petition, p. 22. The question of federal jurisdiction was first raised at oral argument before the Seventh Circuit panel. The parties were directed to file supplemental briefs addressing this question. The brief of Respondent agreed with Petitioners that federal jurisdiction existed. The judges apparently reached the same conclusion. The published opinion of the Seventh Circuit states parenthetically: "The pending RICO claim made it proper for the district court to exercise supplemental jurisdiction over the state-law claim." *Id.* at p. 2a. Petitioners incorrectly state that the Seventh Circuit "held there were [*sic*]

no federal jurisdiction and thus the matter should be dismissed." Petition, p. 25. Petitioners' statement is without basis and contrary to the explicit language of the published Opinion stating that there was federal jurisdiction over Petitioners' claims.

Petitioners state in their Petition: "There is little question but what the federal courts had jurisdiction to hear the matter . . . . " Petition, p. 22. In this Petitioners are correct. There is little question and no issue. The district court did not dismiss Petitioners' action for lack of jurisdiction but entered judgment against them because of evidence prejudicial to a critical element of their case. *See* District Court Order, Petition, Appendix B, p. 18a ("Because plaintiffs failed to effectuate a proper and lawful delivery of the subject matter of the alleged escrow, and because Mid-America never relinquished control . . . no escrow was ever established. Thus, defendant is entitled to summary judgment as a matter of law."). Likewise, the Seventh Circuit affirmed on the basis that "the investors could not prevail at trial," not on the basis of lack of jurisdiction to decide the issues. *See* Opinion of the Seventh Circuit, Petition, Appendix A, p. 2a. Any issue on jurisdiction that may have existed at the Seventh Circuit was resolved in favor of the position taken by Petitioners. No controversy exists on this "issue."

Rule 10 of the Rules of the Supreme Court states: "A petition for a writ of certiorari will be granted only for compelling reasons." Petitioners have raised no issue for review and therefore no compelling reason to grant their Petition.

B. Petitioners' argument that Purdue National Bank, as created under the National Bank Act, is not entitled to certain immunities from their claims relative to the Bank's trust department acting as an escrow agent or purported escrow agent for Petitioners' investment funds presents no issue for review.

Immunity presumes wrongful conduct for which no redress is available. Immunity was not a defense raised by Respondent at the district court nor argued by Respondent at the Seventh Circuit. Immunity was not the basis for the rulings by the district court or the Seventh Circuit.

Petitioners misstate and mischaracterize the rulings of the district court and the Seventh Circuit to bolster a position without a basis in the record. Petitioners state that " . . . the Bank was guilty of violating federal R.I.C.O. violations [*sic*] by acting or purporting to act as an escrow agent for the various Mid-America Energy Oil and Gas Programs in which Petitioners' funds were invested." Petition, p. 28. Petitioners also state that "the lower courts conceded the Bank acted or purported to act as an escrow agent over a million dollars of invested funds owned by Petitioners" and that "the Seventh Circuit Court of Appeals decision directly gave Purdue National Bank immunity from such misconduct" [as an escrow agent]. *Id.* However, lower courts did not find that Respondent Bank acted as an escrow agent over Petitioners' funds. To the contrary, the district court's order granting summary judgment in favor of Respondent Bank states: "The new evidence indicates that it was legally

impossible for an escrow relationship to have been created between plaintiffs and defendant. . . . " District Court Order, Petition, Appendix B, p. 11a. The district court also states: "As a matter of law, no escrow relationship was ever established with PNB because of the legally deficient manner of delivery." *Id.* The Opinion of the Seventh Circuit affirmed the judgment of the district court and states: "The Bank did not act as escrow agent. . . . " Opinion of the Seventh Circuit, Petition, Appendix A, p. 2a. If the Bank was not an escrow agent of Petitioners' monies, the Bank could not have engaged in misconduct as an escrow agent. There is no misconduct for which it could have been given immunity.

The Seventh Circuit did not create some new "immunity" for banks or take away Petitioner's right to legal redress, as suggested by Petitioners. *See* Petition, pp. 28-29. Rather, the Seventh Circuit refused to redefine the relationship of a bank to the payors of the bank's depositors in a way that would allow Petitioners to recover their investment losses from the Bank. The Seventh Circuit declined to recognize a *new* duty on the part of banks to investigate all deposits to satisfy themselves that depositors were entitled to withdraw funds deposited by them. *See* Opinion of the 7th Circuit, Petition, Appendix A, p. 4a ("Requiring a bank to restrict all deposits until satisfying itself that the depositor is entitled to the money would pour molasses on the gears of commerce – and with little benefit to people like the plaintiffs, for malefactors would just make sure that they did not maintain their accounts at the banks that were supposed to be escrow agents."). Petitioners themselves cite no authority that supports the

imposition of such a duty and Respondent has uncovered none.

Petitioners have created an issue that does not exist in the record. A finding by this Court that Respondent Bank is not immune to the claims of Petitioners would not affect the judgment below, which was based on lack of evidence on a critical element of Petitioners' case – not on immunity. The resources of this Court should not be wasted upon a case that presents little more than a veiled request for review of the factual record below without any showing that the factual findings by the district court or its judgment based on those findings were incorrect.

CONCLUSION

The petition for a writ of certiorari is based on "issues" not in controversy, is frivolous and should be denied summarily.

Respectfully submitted,

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